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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TOMMY JAMES PRUITT, JR. Defendant and Appellant.	E070506 (Super.Ct.No. INF1700288) OPINION

APPEAL from the Superior Court of Riverside County. Elaine M. Kiefer, Judge. Affirmed.

Sandra Gillies, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant, Tommy James Pruitt, Jr., of assault with a deadly weapon, a vehicle (Pen. Code, § 245, subd. (a)(1)),[1] and found defendant personally inflicted great bodily injury on the victim, L.S. (§ 12022.7, subd. (a)).[2] In this appeal, defendant claims (1) the prosecutor prejudicially erred in cross-examining defendant at trial by asking defendant whether L.S. falsely testified concerning the alleged assault, (2) insufficient evidence supported instructing the jury on flight (CALCRIM No. 372), and (3) the cumulative effect of these errors was prejudicial.

We reject these claims of error, and also find the alleged errors both individually and cumulatively harmless. We therefore affirm the judgment in its entirety.

II. FACTS AND PROCEDURE

A. *Prosecution Evidence*

On June 18, 2016, L.S. was walking with a friend in the open-air parking lot of a shopping mall when he saw defendant parked in the lot in his van. According to L.S., defendant owed L.S. $40 because of a previous incident in which defendant was selling

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[1] Undesignated statutory references are to the Penal Code.

[2] The jury acquitted defendant of a premeditated attempted murder charge (§§ 664, 187; count 1), and was unable to reach a verdict on the lesser offense of attempted voluntary manslaughter, which was dismissed on the prosecution's motion after the court declared a mistrial on the count.

Defendant was sentenced to eight years in state prison, comprised of the upper term of four years for his aggravated assault conviction in count 2, three years for the great bodily injury enhancement on count 2, and one year for an admitted prison prior enhancement. (§ 667.5, subd. (b).)

drugs for L.S. in a casino, and the potential buyers of L.S.'s drugs left the casino without paying for the drugs. L.S. asked defendant where his money was, picked up a "dirt ball," threw it, and hit defendant with it.

Seconds later, defendant drove the van "directly" toward L.S., and in the process drove over three concrete curbs or medians in the parking lot. Apart from several concrete curbs or medians, the parking lot was "open asphalt with painted lines." The van traveled at least 100 feet before hitting the first concrete curb. L.S. tried to run away from the van but fell, and defendant ran over L.S.'s right leg in the van after defendant hit the first curb. L.S. suffered a broken leg which required a metal rod, and L.S. was unable to walk on his leg for three months.

The parking lot was nearly empty of cars when the incident occurred, and only a few people were in the area near defendant's van. A police detective responded to the scene one or two minutes after receiving a report of a person being struck by a vehicle. When the detective arrived, defendant's van was stopped around 150 feet from where L.S. was sitting on a curb, and no one, including defendant, was assisting L.S. The van was pointed toward the parking lot entrance.

Tire marks from the van showed the van's direction of travel, but there were no skid marks from the van's tires, indicating that the van's brakes were used or that the van slowed before it hit L.S. The van's front bumper was pushed into its front driver's side tire, and when officers arrived defendant was trying to dislodge the bumper with a shovel. When an officer approached him, defendant was cooperative and did not try to flee.

B. *Defense Evidence*

1. Defendant's Testimony

Defendant testified in his own defense, claiming he accidentally ran over L.S. after he lost control of his van. He had been living in his van since 2015 and helped other homeless people by giving them rides. In February 2016, he helped L.S. move L.S.'s belongings from a campsite. He did not remember being in a casino with L.S. or selling drugs for L.S.

On the day of the incident, defendant was not angry with L.S. and had no reason to believe L.S. was angry with him. That morning, he picked up some food that supermarkets had discarded, and he was driving around giving the food to homeless people when he saw his friend, L.B., in the shopping mall parking lot. He drove into the parking lot and spoke to L.B. for around two minutes. As he was speaking to L.B., he did not hear or see L.S.

After speaking to L.B., he began driving away and made a U-turn. He raised himself up from the driver's seat to make sure there was no oncoming traffic, and as he did so his foot became tangled in some cables on the floorboard. As he tried to kick the cables off his foot, part of the cables became stuck between the gas pedal and the engine cover to the right of the gas pedal. The van accelerated, became "airborne" when it hit the curbs, and things in the van "went flying all over." Two bags of oranges fell on the floorboard near the cables.

As the van was accelerating, defendant saw two people, around 50 feet in front of him, in the parking lot. One darted to the right, the other to the left, so he could not turn the van in either direction. He regained control of the van after it ran over the third curb. At that point, he stopped, got out of the van, and saw L.S. on the ground. Several bystanders waved him away from L.S. because an ambulance was coming. Minutes later, paramedics arrived. Defendant looked around and underneath his van to assess its damages. He was not looking for "an escape route."

2. L.B.'s Testimony

Defendant's friend, L.B., testified he "ran into" defendant in the parking lot before L.S. was run over. Defendant was in his van, L.B. talked to defendant for less than one minute, then L.B. began walking across the parking lot. At that point, defendant was talking to "a girl" and did not appear angry or upset. After L.B. walked away, he heard the van's engine rev, saw the van hit one of the islands or curbs, and saw people "scrambling." He heard no arguing or yelling and saw nothing being thrown. After the van went over a curb, L.S. sat down on the curb. Defendant got out of the van with a shovel, and people were telling defendant to stay away from L.S.

III. DISCUSSION

A. *Prosecutorial Error*

Defendant claims the prosecutor erred in cross-examining defendant by asking defendant three improper questions concerning L.S.'s veracity. As we explain, the first question was proper, and defendant's objection to this question was properly overruled.

Defendant did not object to the second question and has thus forfeited his claim of error for that question. Defendant's objection to the third question was properly sustained, with no answer being given by defendant.

1. Relevant Background

The prosecutor began his cross-examination of defendant as follows:

"[PROSECUTOR:] [Defendant], you were here when [L.S.] testified; correct?

"[DEFENDANT:] Yes.

"[PROSECUTOR:] **[First Alleged Improper Question:]** *And so what you're saying is that everything he said about that casino incident is false?*

"[DEFENSE COUNSEL:] *Objection, improper question.*

"THE COURT: *Overruled.* [¶] *You can answer.*

"[DEFENDANT:] I never heard about it until today.

"[PROSECUTOR:] Okay. So you don't know anything he's talking about with regard to the casino incident or the money that he was saying that you owed him?

"[DEFENDANT:] I heard about the money, but I never heard about the casino incident.

"[PROSECUTOR:] Okay. So you're saying you heard about the money; what do you mean by that?

"[DEFENDANT:] In our last preliminary hearing.

"[PROSECUTOR:] So before that you've never heard it?

"[DEFENDANT:] No, sir.

"[PROSECUTOR:] Okay. So when he is saying that you had that interaction between him and you at the casino, that never happened?

"[DEFENDANT:] Never.

"[PROSECUTOR:] Okay. And there was never any money that you owed him?

"[DEFENDANT:] No.

"[PROSECUTOR:] And so when he said—because you also saw the video that was playing of him at the scene; is that correct?

"[DEFENDANT:] Yes.

"[PROSECUTOR:] And in that video you can hear him saying, like, I asked him about the money he owes me; is that correct?

"[DEFENDANT:] Yes.

"[PROSECUTOR:] And so in that video, you don't know what he's talking about there, either?

"[DEFENDANT:] We never had any conversation at all that day.

"[PROSECUTOR:] **[Second Alleged Improper Question:]** *So he's just making that up?*

"[DEFENDANT:] *That's his testimony.*

"[PROSECUTOR:] But what you're saying is that didn't happen; right?

"[DEFENDANT:] Not with me.

"[PROSECUTOR:] And there was never that debt between you and him; right?

"[DEFENDANT:] No, there was not.

"[PROSECUTOR:] **[Third Alleged Improper Question:]** *So by that, you would be saying that he is lying in those separate instances?*

"[DEFENSE COUNSEL:] Objection, relevance.

THE COURT: Sustained. [¶] Don't answer that. [¶] Next question." (Italics added.)

2. Applicable Legal Principles and Analysis

Prosecutorial misconduct or error[3] amounts to either federal constitutional error or state law error. "'Under the federal Constitution, to be reversible, a prosecutor's improper comments must "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" [Citations.] "'[On the other hand] conduct by a prosecutor that does not render a criminal trial fundamentally unfair is [still] prosecutorial misconduct under state law . . . if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'" [Citation.]" (*People v. Rodriquez*, *supra*, 26 Cal.App.5th at p. 904.) Here, none of the prosecutor's challenged questions of defendant either deprived defendant of his due process right to a fair trial or constituted reprehensible or deceptive methods to persuade the jury.

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[3] California courts prefer the term prosecutorial "error" to "misconduct" because "the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind [in order to commit reversible error]." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Rodriquez* (2018) 26 Cal.App.5th 890, 904-905 [prosecutor's behavior need not be in bad faith in order to constitute reversible error], review granted Nov. 28, 2018, S251706.)

California courts are required to "'carefully scrutinize'" a prosecutor's "'"were they lying"'" questions "'in context.'" (*People v. Tafoya* (2007) 42 Cal.4th 147, 178, quoting *People v. Chatman* (2006) 38 Cal.4th 344, 382; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 319.) Such "were they lying" questions "'should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. [But], in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him [or her] to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions.'" (*People v. Tafoya, supra*, at p. 178.) "'A defendant who is a percipient witness to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately. As a result, [the defendant] might also be able to provide insight on whether witnesses whose testimony differs from his own are intentionally lying or are merely mistaken.'" (*Ibid*.)

The First Alleged Improper Question: Defendant complains that the prosecutor asked defendant whether L.S.'s testimony about "the casino incident" was false. L.S. had testified that defendant sold drugs for L.S. in a casino and owed L.S. $40 for drugs that a person in the casino took without paying for. Defense counsel objected to the question as "improper," but the court did not abuse its discretion in overruling the objection. Defendant had personal knowledge of whether L.S.'s testimony about "the casino incident" was true or false, and on that basis defendant was able to assist the jury in determining whether "the casino incident," as testified to by L.S., had in fact occurred.

The question was proper because it "'sought to elicit testimony that would properly assist the trier of fact in ascertaining whom to believe'" about the casino incident—L.S. or defendant. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 179.)

The Second Alleged Improper Question: Defendant next complains the prosecutor asked defendant whether L.S. was "making . . . up" his testimony that he, L.S., confronted defendant about the money L.S. claimed defendant owed L.S. before defendant drove his van toward L.S., and that defendant owed L.S. money. Although defendant has forfeited this claim because his counsel did not object to this question (*People v. Chatman*, *supra*, 38 Cal.4th at p. 380), the claim lacks merit. The question was not argumentative and did not call for defendant to give speculative or irrelevant testimony. (*Ibid*.) Defendant had personal knowledge of whether L.S. confronted defendant about the money L.S. claimed defendant owed L.S. and whether defendant owed L.S. any money. Defendant responded to the question by saying, "That's his [L.S.'s] testimony," and by denying that L.S. confronted defendant about the alleged debt and that defendant owed L.S. any money. The question and defendant's answers assisted the jury in determining whether defendant or L.S. was telling the truth about the alleged confrontation and drug debt. (*Id.* at pp. 382-383.)

The Third Alleged Improper Question: After defendant denied that L.S. confronted defendant about the alleged debt and also denied that there was any debt, the prosecutor asked defendant: "*So by that, you would be saying that he [L.S.] is lying in those separate instances?* (Italics added.) The court sustained defense counsel's

relevancy objection and directed defendant not to answer. The question was objectionable not because the fact of whether L.S. was lying on these two points was irrelevant, but because the question was argumentative—given that defendant had just testified that L.S. *did not* confront defendant about the alleged debt and *there was no debt*. Although the third question was erroneous, it did not amount to prosecutorial misconduct or error. Nothing in the record suggests the prosecutor asked the question in order to elicit evidence he knew was inadmissible, and the prosecutor only asked the question once; he did not repeatedly ask it in an attempt to berate defendant or force him to call L.S. a liar in order to inflame the passions of the jury. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 98.) In context, the third question was neither deceptive nor reprehensible, and it did not deprive defendant of a fair trial.

Furthermore, the sustained objection to the third question and the court's direction to defendant not to answer the question cured any prejudice the question may have had to defendant. A criminal conviction will not be reversed based on prosecutorial error unless it is reasonably possible that the jury would have reached a result more favorable to the defendant had the error not occurred. (*People v. Gonzales and Soliz, supra*, 52 Cal.4th at pp. 319-320.) Here, the jury was instructed that the attorneys' questions were not evidence, to ignore an attorney's question if an objection to it was sustained, and not to "assume that something is true just because one of the attorneys asked a question that suggested it was true." (CALCRIM No. 104 [Evidence].) We presume the jury followed the court's instructions. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 152.) And in

light of the instructions, there is no reasonable possibility that the prosecutor's third, unanswered question affected the outcome.

B. *Substantial Evidence Supported the Flight Instruction, and Any Error in Giving the Flight Instruction Was Harmless*

The jury was instructed on flight, pursuant to CALCRIM No. 372, as follows: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself." Defendant claims the court prejudicially erred in giving the flight instruction because insufficient evidence supported it and the error was prejudicial. We disagree on both counts.

A court has a duty to instruct on flight sua sponte whenever the prosecution relies on evidence of the defendant's flight to show the defendant's guilt. (*People v. Jurado* (2006) 38 Cal.4th 72, 126; § 1127c.) Although flight "'requires neither the physical act of running nor the reaching of a faraway haven'" (*People v. Jurado*, *supra*, at p. 126), the circumstances of the defendant's departure, or attempted departure, from the crime scene may support an inference that the defendant harbored a consciousness of guilt (*People v. Turner* (1990) 50 Cal.3d 668, 695). The circumstances of the defendant's departure, or attempted departure, from the crime scene must suggest that the defendant harbored "'a

purpose to avoid being observed or arrested.'" (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

The evidence supporting a flight instruction must be substantial—that is, it must be reasonable, credible, and of solid value. (*People v. Turner*, *supra*, 50 Cal.3d at pp. 694-695; see *People v. Johnson* (1980) 26 Cal.3d 557, 576.) In order to be entitled to a flight instruction, the prosecution is only required to show that a reasonable jury *could* find that the defendant fled or attempted to flee, and based on that evidence permissibly infer that the defendant harbored a consciousness of guilt and a purpose to avoid being arrested or detected. (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 328.)

Here, substantial evidence supported the flight instruction. The prosecution presented reasonable, credible, and solid evidence that (1) defendant's van did not stop until it was 150 feet past the point at which it ran over L.S., (2) when the van stopped, it was pointing toward the parking lot entrance, (3) when officers arrived at the scene one or two minutes after 911 was called, defendant was trying to dislodge his front bumper from his front driver's side tire or wheel area with a shovel, and (4) defendant made no attempt to assist L.S. after he ran over L.S.

All of this evidence supported a reasonable inference that, as the prosecution argued to the jury, defendant "knew what he had just done and was intending to do, and he was trying to get away with it." This is so even though the evidence also showed defendant was cooperative with the officer who approached him after the incident and, at that point, defendant did not attempt to flee.

Even if insufficient evidence supported the flight instruction, we discern no prejudice. There is no reasonable probability that the flight instruction affected the jury's guilty verdict on the aggravated assault charge or its true finding on the great bodily injury enhancement allegation. (*People v. Turner*, *supra*, 50 Cal.3d at p. 695; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The flight instruction itself told the jury it was free to determine "the meaning and importance" of the flight evidence, and that the evidence of flight was alone insufficient to prove defendant's guilt. (*People v. Crandell* (1988) 46 Cal.3d 833, 870 ["[T]he instruction did not posit the existence of flight; both the existence and significance of flight were left to the jury."].) Furthermore, in convicting defendant of the aggravated assault charge, the jury necessarily rejected defendant's testimony that he lost control of his van and accidentally ran over L.S. and necessarily credited L.S.'s testimony to the effect that the incident was not an accident. Given the overall state of the evidence, the flight instruction was not critical to the prosecution's case, and it is not reasonably probable that defendant would have realized a more favorable result had it not been given.

C. *There Was No Cumulative Prejudicial Error*

Lastly, defendant claims the cumulative effect of the prosecutor's "were they lying" questions, in combination with the flight instruction, deprived him of a fair trial and requires reversal of his aggravated assault conviction and great bodily injury enhancement. We disagree. As discussed, none of the prosecutor's "were they lying questions" amounted to prosecutorial error or misconduct. Although the prosecutor's

third question was argumentative, defense counsel's objection to it was sustained, defendant did not answer it, and the jury was effectively instructed to disregard it. And, for the reasons we have also discussed, any error in giving the flight instruction was also harmless. None of the alleged errors, either individually or cumulatively, requires reversal. (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.)

IV. DISPOSITION

The judgment is affirmed.

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FIELDS
J.

We concur:

CODRINGTON
Acting P. J.

RAPHAEL
J.